Kentucky Law Journal

Volume 69 | Issue 1 Article 2

1980

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> This cacophony of grievances, subjection, supervisors, layoffs, and domination by agents of the enemy sounds foreign in the idyllic ivory tower where one hears only the music of the spheres. It also seems alien to the earthy campus struggles where power flows not so much from the titles and offices as from the charisma, credentials, and credibility of the individual combatants.[1]

INTRODUCTION

Collective bargaining among university professors is a recent phenomenon. Because it is such a new area in the law of collective bargaining, the major issues presented before the National Labor Relations Board (NLRB or Board) and subsequently the courts under the National Labor Relations Act have been the threshold questions of Board jurisdiction and definition of appropriate bargaining units.[2] Indeed, most cases involving definition of an appropriate bargaining unit have not proceeded beyond the level of the Board; consequently,

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[1] Moore, *The Determination of Bargaining Units for College Faculties*, 37 U. PITT. L. REV. 43, 49 (1975).

[2] A few cases have presented charges of a refusal to bargain with the representatives of the employees. *See* Catholic Univ. of America, 236 N.L.R.B. 1071 (1978); Yeshiva Univ., 231 N.L.R.B. 597 (1977), *enforcement denied*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980); Kendall College, 228 N.L.R.B. 1083 (1977), *enforced*, 570 F.2d 216 (7th Cir. 1978); Trustees of Boston Univ., 228 N.L.R.B. 1008 (1977), *enforced*, 575 F.2d 301 (1st Cir. 1978), *vacated & remanded*, 445 U.S. 912 (1980); Niagara Univ., 226 N.L.R.B. 918 (1976), *enforcement denied*, 558 F.2d 1116 (2d Cir. 1977); St. Francis College, 224 N.L.R.B. 907 (1976), *enforcement denied*, 562 F.2d 246 (3rd Cir. 1977); Mercy College, 219 N.L.R.B. 81 (1975), *enforcement denied*, 536 F.2d 544 (2d Cir. 1976), *dismissed*, 231 N.L.R.B. 315 (1977); Wentworth Inst., 210 N.L.R.B. 345 (1974), *enforced*, 515 F.2d 550 (1st Cir. 1975). These cases generally have been summarily adjudicated by the Board. As the above citations indicate, the courts of appeals have given a mixed reception to the Board's rulings on cases.

NLRB decisions provide the controlling law on this issue. One major exception to this generalization, however, is the recent decision of the United States Supreme Court in *NLRB v. Yeshiva University*.[3] In *Yeshiva*, the Court rejected the Board's established position that faculty committee members are not managerial employees by virtue of certain management functions of their committees and held that such faculty members were to be excluded from the bargaining unit.

The *Yeshiva* decision has an enormous potential to frustrate the development of a collective bargaining apparatus by university faculty,[4] particularly when applied to smaller colleges and universities. This article will discuss *Yeshiva* and its impact on the formulation of an appropriate bargaining unit for university professors. Other problems in the unit definition context also will be examined. Finally, issues surrounding Board jurisdiction over religious educational institutions will be analyzed.

I. JURISDICTION OF THE BOARD

For collective bargaining to proceed under the National Labor Relations Act, the activities in question must fall within the jurisdiction of the Board. This jurisdiction extends broadly to include employers and employees whose disputes adversely affect interstate commerce.[5] Several significant exceptions to this jurisdictional reach are stated in the Act. Federal and state governments and their political subdivisions are exempted as employers;[6] agricultural workers, domestic servants, independent contractors, and supervisors are also ex-

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[3] NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

[4] In discussions with the author at a recent seminar sponsored by Region 9 of the National Labor Relations Board, the view was expressed that the *Yeshiva* decision amounted to a tremendous setback to the Board's endeavors in recent years to assure private university professional employees the rights to select a bargaining representative and to bargain collectively with their employer. According to this view, *Yeshiva* represents a significant jurisdictional restriction now imposed against the Board in its development of labor law in the university context. *See generally*, Wall St. J., Feb. 21, 1980, at 6, col. 1 (brief analysis of the Supreme Court's *Yeshiva* decision).

[5] 29 U.S.C. §§ 151, 152(6), (7) (1976).

[6] *Id.* § 152(2).

empted from the statute's scope.[7] Further, the Board traditionally has declined to assert its jurisdiction when such assertion would not aid the implementation of the policies of the Act.

The initial position of the Board with regard to the private university as an employer in interstate commerce was that Act policies would not be aided by an assertion of Board jurisdiction. In *Trustees of Columbia University*,[8] the Board relied on subjective factors of policy considerations in declining to assert its jurisdiction over private universities. The Board's decision rested predominantly upon a recognition of the unique status of the university and the unique nature of its activities.[9]

> Under all the circumstances, we do not believe that it would effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution.[10]

The Board's holding was narrow. In citing the unique status of the university, the Board did not hold that the university's nonprofit and noncommercial orientation or its educational and charitable purposes defeated jurisdiction. Indeed, the Board explicitly stated the contrary and held that the exercise of jurisdiction simply was not warranted in the given situation.[11]

The Board's policy of declining jurisdiction where the employer was found to be in the business of education raised

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[7] *Id.* § 152(3).

[8] 97 N.L.R.B. 424 (1951).

[9] The facts of *Trustees of Columbia Univ.* affirm that the Board looked only to the nature of the employer in that case. The bargaining unit sought was one of clerical workers on the staff of the library. Although it is perhaps true that the university was distinguishable from the typical industrial or commercial employer and thereby the Board's disinclination to deal with it was justified, the employees who sought representation in *Columbia* were by no means significantly different from the typical industrial or commercial employee.

[10] Trustees of Columbia Univ., 97 N.L.R.B. at 427.

[11] In sum, the Board stated: "We do not believe that it would effectuate the policies of the Act to assert jurisdiction here." *Id.* at 425.

the question of defining an educational institution. Beginning with *Woods Hole Oceanographic Institution*,[12] the Board developed a balancing test to determine whether an employer was primarily a commercial concern or an educational one. Among the factors considered were the degree of financial support and control coming from without the institution, for whom research was performed, who employed the researchers, and who operated the concern.[13] The Board asserted jurisdiction when it found the sum of activity to be primarily commercial and declined jurisdiction when the activity was noncommercial and closely connected with educational purposes.[14] The frequent result was that the Board would not become involved with collective bargaining at universities even at the instance of blue-collar employees.[15]

Nineteen years after the *Columbia* decision, the Board reversed its policy by asserting jurisdiction in *Cornell University*.[16] Noting the size and scope of the operations of a modern, multi-campus university, the Board concluded that an assertion of jurisdiction was required "to insure the orderly, effective, and uniform application of the national labor policy."[17] The Board recognized that large educational institutions do have a substantial impact on commerce.[18] The *Cornell* decision was followed by another assertion of jurisdiction over private universities in *Yale University*[19] and by the promulgation of a jurisdictional rule. This rule provided that the Board would assert jurisdiction over any private nonprofit col-

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[12] 143 N.L.R.B. 568 (1963).

[13] *Id.*

[14] Leland Stanford Jr. Univ., 152 N.L.R.B. 704 (1965); Massachusetts Inst. of Technology, 152 N.L.R.B. 598 (1965); University of Miami Inst. of Marine Science Div., 146 N.L.R.B. 1448 (1964).

[15] Amendments to the National Labor Relations Act enacted by Congress in 1959 specifically restated and codified the Board's already exercised discretion to decline to assert jurisdiction where the impact of the employer's activities on interstate commerce were not found to be substantial. 29 U.S.C. § 164(c)(1) (1976). It may be argued that by virtue of these amendments Congress implicitly approved the Board's commercial-educational test for asserting jurisdiction.

[16] 183 N.L.R.B. 329 (1970).

[17] *Id.* at 334.

[18] *Id.*

[19] 184 N.L.R.B. 329 (1970).

lege or university with a gross annual revenue of $1,000,000 or more.[20] Thus, the Board decisively opened up a new area for collective bargaining under the auspices of the Act.

While *Cornell* has been heralded as the cornerstone for protection of collective bargaining rights of university employees under the Act, an interesting quirk of that decision is that the jurisdiction of the Board was not a litigated issue. Although the union had actively sought to represent a unit of nonprofessional library employees, it was the employer, Cornell University, which filed the representation petition for election. Thus, jurisdiction was not an issue between the parties. The Board, however, obviously had to overrule *Columbia* in order to conduct the requested election in *Cornell,* and apparently the Board was eager to do so.[21]

The Board's new approach of extending jurisdiction faced its first direct court challenge in *NLRB v. Wentworth Institute.*[22] In enforcing the Board's bargaining order, the First Circuit Court of Appeals rejected the argument that an exclusion from jurisdiction for private nonprofit educational institutions should be implied from the Act, from its legislative history,[23] or from the Board's previous policy.[24] The court noted that the Board never had ruled in its earlier cases that it lacked jurisdiction.[25] The court stated: "With respect to the Board's own precedents, it is not an abuse of discretion for the Board to reappraise its position in light of developments in society, as long as its new construction is consistent with

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[20] 29 C.F.R. § 103.1 (1970).

[21] Even though simply petitioning for an election presents an implicit challenge to the precedent of a refusal to assert jurisdiction, the decision of the Board in *Cornell* would have more precedential value if the jurisdictional issue had been litigated actively by the parties to the case.

One commentator has criticized the Board's assertion of jurisdiction in *Cornell* as being ill-advised on the facts of that case. Elizabeth Moore has urged that the extension of jurisdiction was inappropriate because that assertion meant the imposition of an industrial labor relations model on a wholly different sort of employer. Moore argues that the Board "considered the impact on commerce rather than the impact on education." Moore, *supra* note 1, at 43.

[22] 515 F.2d 550 (1st Cir. 1975).

[23] *Id.* at 553.

[24] *Id.* at 554.

[25] *Id.* at 555.

the language and tenor of the Act."[26] *Wentworth* effectively settled the issue of the Board's jurisdiction over the private university as an employer.[27]

The *Wentworth* decision, however, left other issues unsolved. It did not settle the question of whether the Board properly has jurisdiction over a private university owned or operated by a religious institution.[28] Nor did *Wentworth* decide whether the Board has jurisdiction over the individuals it seeks to include in any given bargaining unit, a question which has spawned the bulk of the university cases heard by the Board.

II. SUPERVISORY-MANAGERIAL EMPLOYEES

The National Labor Relations Act provides that supervisors cannot be included in a bargaining unit with nonsupervisory employees.[29] The Board and the judiciary have developed a similar exclusion for "managerial" employees.[30] Thus, in attempting to define the appropriate bargaining unit, the Board and courts must determine whether certain employees are supervisors or managerial employees. In the university faculty context, this determination has two dimensions, both created by the collegial system of university governance. First, the

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[26] *Id.*

[27] Wentworth, however, did not end the criticism leveled against the application of the Act in the university context. Commentators writing before and after the *Wentworth* decision expressed theories that the differences between the university governance structures and the industrial model of the Act rendered the Board's assertion of jurisdiction over universities inappropriate; that application of the Act to universities would require drastic adjustments within the universities' governmental organizations; and that application of the Act to the academic community was not particularly well thought out. *See* Brousseau, *Collective Bargaining and Private University Governance: A Look for the Law Schools*, 29 U. FLA. L. REV. 625 (1977); Ferguson, *Collective Bargaining in Universities and Colleges*, 19 LAB. L.J. 778 (1968); Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A. L. REV. 63 (1973); Note, *Collective Bargaining by University and College Faculties Under the National Labor Relations Act*, 36 OHIO ST. L.J. 71 (1975).

[28] See notes 151-80 *infra* and accompanying text for a discussion of the Board's treatment of collective bargaining at religious institutions.

[29] 29 U.S.C. §§ 152(3), (11), 164(a) (1976).

[30] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320 (1947).

question arises, whether the faculty as a whole or in committee are supervisory or managerial employees. If this question is answered negatively, the issue then becomes whether the department chairmen are supervisory or managerial employees. These questions of the supervisory or managerial status of the various faculty members produced much litigation after *Cornell* and were nearly settled issues under the decisions of the Board. Recent decisions of the courts of appeals, however, questioned the Board-developed solutions, and the Supreme Court's decision in *Yeshiva* firmly rejected the Board's position, at least on the managerial issue.

Before inquiry can be made into the question of the managerial or supervisory status of faculty members, these terms first must be defined. The statutory definition of supervisor provides that an individual will be found to be a supervisor if he is authorized to act in the interest of the employer, while still exercising his own independent judgment in hiring, firing, promoting and disciplining other employees, in directing their work, in adjusting their grievances, or in recommending any such action to the employer.[31] Thus, an employee authorized to perform any of these functions will be excluded from the bargaining unit of supervised employees on the ground that such an employee is a supervisor. Similarly, managerial employees, while not technically supervisors, are closer to management than to rank and file employees. Those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" are considered to be managerial and are excluded from the unit.[32]

A. *Faculty Members as a Whole and Faculty Committees*

In the university context, the Board has consistently held that faculty members as a whole are not supervisory or managerial employees. Even though they may exercise authority to perform functions normally considered to be supervisory,

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[31] 29 U.S.C. § 152(11) (1976).

[32] NLRB v. Bell Aerospace Co., 416 U.S. 267, 288 (1974) (quoting Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947)).

faculty members are not considered to be supervisors or managerial employees if that authority is exercised as a group.

This group authority distinction was first expressed in *C.W. Post Center of Long Island University.*[33]

> [W]e are of the view that the policymaking and quasi-supervisory authority which adheres to full-time faculty status but is exercised by them only as a group does not make them supervisors within the meaning of Section 2(11) of the Act, or managerial employees who must be separately represented. Accordingly, we find that full-time university faculty members qualify in every respect as professional employees under Section 2(12) of the Act, and are therefore entitled to all the benefits of collective bargaining if they so desire.[34]

The Board's contrast between managerial employees and professional employees, however, is misleading and fails to address satisfactorily the managerial issue. A finding that an individual has the characteristics of a professional employee, *i.e.,* one who predominantly performs intellectual, nonstandardizable work requiring a background of advanced study and involving the exercise of discretion and judgment,[35] should not preclude a finding that the same individual also possesses supervisory or managerial authority. That professional employees would not be considered supervisors or managers, however, appeared to be the Board's conclusion.[36]

The Board did not elaborate on its *Post* theory until *Adelphi University.*[37] In *Adelphi,* the supervisor-manager issue involved members of the grievance and personnel commit-

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[33] 189 N.L.R.B. 904 (1971).

[34] *Id.* at 905. This view was criticized severely by the Second Circuit Court of Appeals in its *Yeshiva* decision. The court observed that when the Board first announced its *Post* principle of collective exercise of authority, "it did so without benefit of analysis, and without citation to pertinent administrative decisions, judicial precedents or legislative history." *Yeshiva,* 582 F.2d at 698 n.14.

[35] 29 U.S.C. § 152(12)(a) (1976).

[36] In *Yeshiva* the Supreme Court specifically rejected the Board's distinction between the professional interests of the faculty and the managerial interests of the university. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

[37] 195 N.L.R.B. 639 (1972). In Manhattan College, 195 N.L.R.B. 65 (1972), and Fordham Univ., 193 N.L.R.B. 134 (1971), the Board cited *Post* as controlling without elaborating on its theory that exercising group supervisory authority did not make faculty members supervisors.

tees instead of the whole faculty as in *Post*. These committees exercised a great deal of authority that was obviously supervisory or managerial in nature. The Board, however, held that these powers were not sufficient to qualify the individual members of the committees as supervisors or managers, since the powers were exercised by a group and in accordance with collegiate principles of university governance.[38] The Board noted that a purely collegial system of campus governance posed difficulties with the supervisor/managerial issue. "Because authority vested in one's peers, acting as a group, simply would not conform to the pattern for which the supervisory exclusion of our Act was designed, a genuine system of collegiality would tend to confound us."[39] The Board, however, was not faced with a true "management committee" situation, and its holding rested on the finding that the ultimate decisionmaking authority of the institution rested with the university's Board of Trustees and not with the faculty committees.[40]

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[38] The Board stated:

> It is therefore apparent that these faculty bodies—the more inclusive one in *Post* and the smaller, representational one here—are not quite either fish or fowl. On the one hand they do not quite fit the mold of true collegiality. But on the other, surely they do not fit the traditional role of "supervisor" as that term is thought of in the commercial world or as it has been interpreted under our Act. We are not disposed to disenfranchise faculty members merely because they have some measure of quasi-collegial authority either as an entire faculty or as representatives elected by the faculty. We therefore find that the several members of the University personnel and grievance committees here are not supervisors within the meaning of the Act solely by reason of such membership, and we shall include them in the bargaining unit.

Adelphi Univ., 195 N.L.R.B. at 648.

In support of the Board's views, one commentator, Matthew W. Finkin, has argued that the faculty's judgment on supervisory or managerial matters is collectively formed, that the judgment is subject to independent review by the university administration, and that the faculty have no real right to compel implementation of their judgments. Thus, Finkin would draw a distinction between exercising influence over matters of professional concern and the possession of formal bureaucratic authority. Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608, 614-18 (1974). The difficulty with this argument is that the legal definitions of supervisors and managerial employees do not draw the distinction Finkin proposes.

[39] Adelphi Univ., 195 N.L.R.B. at 648.

[40] Mr. Justice Powell, writing for the Court in *Yeshiva*, rejected the "ultimate authority" rationale with the observation that such authority being invested in the

In subsequent cases, the Board developed an additional rationale in support of the *Post* principle. In *University of Miami,*[41] the Board again noted that final authority for "management" decisions was vested in the university's Board of Trustees but also pointed out that decisionmaking power held by faculty under a collegial system was "exercised in the faculty's own interest rather than 'in the interest of the employer.' "[42]

In the first case to reach appellate review challenging the *Post* principle of finding faculty to be nonsupervisors, the First Circuit Court of Appeals sustained the Board's holding.[43] In *NLRB v. Wentworth Institute,*[44] the court enforced the Board's bargaining order, making the following observation on the governance of the Institute: "The structure is hierarchical, and there is no evidence of an instance of significant faculty impact collectively or individually on policy or managerial matters other than the scheduling of exams, classes, and other such routine matters."[45] The Wentworth governance system, however, was markedly different from that normally encountered in four-year colleges and universities.[46] No faculty member or committee at Wentworth had any authority that could reasonably be termed supervisory or managerial. Thus, the Board was not faced with the difficulties it encountered in *Adelphi* or *Post,* and its decision could be easily affirmed.

The *Yeshiva* case was more difficult, for Yeshiva Univer-

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employees themselves "has never been thought to be a prerequisite to supervisory or managerial status. Indeed, it could not be since every corporation vests that power in its board of directors." NLRB v. Yeshiva Univ., 444 U.S. at 685 n.21.

[41] 213 N.L.R.B. 634 (1974).

[42] *Id.* This language was echoed in New York Univ., 221 N.L.R.B. 1148, 1149 (1975).

[43] NLRB v. Wentworth Inst., 515 F.2d 550 (1st Cir. 1975).

[44] *Id.*

[45] *Id.* at 557.

[46] Wentworth Institute was a two-year college. The governance structure of Wentworth was accompanied by the usual plethora of faculty committees, but none of those committees had any real power or authority, and the facts of the case presented no evidence of significant faculty input on decisions of substance. The absence of such an authoritative committee system enabled the court to affirm the Board's conclusion that Wentworth's faculty were not supervisory or managerial employees. *Id.*

sity's system of governance greatly differed from Wentworth's.[47] The Yeshiva system included six undergraduate colleges and four graduate schools, each operating with substantial autonomy over curriculum design, grading systems, and academic standards. These colleges and schools were governed by a strong committee system. The smaller colleges frequently used a simple faculty consensus which effectively controlled appointments, promotion, tenure, curriculum, and academic standards. In fact, the university's organization closely resembled the genuine collegial system that the Board described in *Adelphi*.[48] Nevertheless the Board ordered the university to bargain,[49] resulting in the Board's petition to the Second Circuit for enforcement of its bargaining order.

The Second Circuit, however, denied enforcement of that order. Rejecting the inference that employees who are found to be professionals necessarily are not supervisors or managerial employees, the court dismissed the Board's arguments that the faculty of Yeshiva were neither supervisory nor managerial employees.[50] Pointing to the extensive control the Yeshiva faculty possessed over key policies of the university, the court concluded: "[T]hey no longer are simply exercising individual professional expertise. *They are, in effect, substantially and pervasively operating the enterprise.*"[51] The Board's second argument, based on the *Post* principle that the *collective* exercise of supervisory or managerial authority saves the individuals involved from supervisory or managerial

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[47] For a description of the governance system, see NLRB v. Yeshiva Univ., 582 F.2d 686 (2d Cir. 1978).

[48] See text accompanying note 39 *supra* for a discussion of a purely collegial governance system.

The Second Circuit Court of Appeals in *Yeshiva* recognized the true functioning of the governance system of Yeshiva. "Indeed, the ability of the full-time faculty effectively to recommend or even to exercise many of the enumerated powers of section 2(11) and to formulate and effectuate University policy is not really disputed here." *Id.* at 696.

[49] Yeshiva Univ., 231 N.L.R.B. 597 (1977). The Board previously had defined the bargaining unit to include full-time faculty. Yeshiva Univ., 221 N.L.R.B. 1053, 1057 (1975).

[50] NLRB v. Yeshiva Univ., 582 F.2d at 697.

[51] *Id.* at 698 (emphasis added).

status, similarly was rejected. The court recognized that a literal reading of the statutory definition of the term supervisor supported the Board's exclusion of faculty committee members from supervisory status[52] but observed that nothing in the Act's legislative history supported the Board's view.[53] The court stated that a realistic interpretation of the statute would find committee members to be supervisors if the committee performed supervisory functions.[54] The court, however, found resolution of the supervisor issue unnecessary because the exclusion of managerial employees from the bargaining unit had no such analytical problem concerning group exercise of authority.[55]

> Logically, we see no reason that the fact that the policies of a company are created by a group . . . rather than by an individual should be of significance in determining whether an individual has managerial status, and the Board has advanced no satisfactory rationale for the weight it has given this factor.[56]

The Board also advanced the arguments that the faculty were not managerial or supervisory employees because they acted on their own behalf and not on the behalf of the employer and because ultimate authority resided in the Board of Trustees. As for the former, the court found nothing in either the record or the Board's reasoning to support the proposition that the faculty acted on its own behalf and not on the uni-

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[52] Since the control here in issue is not that of individual faculty member over nonprofessionals, but the collective control exercised by the faculty either in concert, through department chairmen, or through faculty dominated committees, it must be conceded that if read literally the statutory definition can be construed not to cover the full-time faculty. Since students are not employees the individual faculty supervision over students does not fit within the statutory definition, which requires that the supervisory power be directed to employees.

Id. at 699.

[53] The court noted that "such collective supervision was not actively considered by Congress at the time." *Id.*

[54] *Id.* The court also questioned the precedential value of *Post.* See note 34 *supra* for the court's language.

[55] *Id.*

[56] *Id.* at 699-700.

versity's behalf.[57] Noting the autonomous nature of Yeshiva's colleges and the record of faculty decisionmaking, the court of appeals concluded that at Yeshiva "faculty" and "college" were nearly synonymous.[58] As for the ultimate authority argument, the court found this stance "particularly unconvincing."[59] The court observed that the Board had never been precluded from finding corporate employees to be supervisors or managerial employees even though they were ultimately controlled by their boards of directors.[60] Having thus rejected the Board's attempt to apply the *Post* principles to *Yeshiva,* the court denied enforcement of the Board's bargaining order.

The Second Circuit's *Yeshiva* decision temporarily threw the state of the law on the supervisory-managerial status of university professors into considerable confusion. A re-examination of the Board's precedents and the court of appeals' decision was made possible by the granting of certiorari by the United States Supreme Court.[61] The Board urged the same arguments before the Supreme Court as it advanced before the court of appeals: that university faculty were not managerial employees because supervisory authority was exercised collectively; that faculty acted on their own behalf; and that final authority rested with the university Board of Trustees.[62] In the majority opinion,[63] Justice Powell disposed of the first and third arguments with the observations that they were "flatly inconsistent" with precedent, "insupportable," and abandoned by the Board's attorneys on oral argument.[64] In response to the Board's second argument that faculty members acted in their own interest, the Court stated:

> In arguing that a faculty member exercising independent

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[57] *Id.* at 700.

[58] "[T]he fact that the administration and Board of Trustees of Yeshiva so rarely interfered in the faculty decisions indicates that the interests of the faculty and of the University were almost always co-extensive." *Id.*

[59] *Id.* at 701.

[60] *Id.*

[61] NLRB v. Yeshiva Univ., 440 U.S. 906 (1979).

[62] NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

[63] Justice Powell's majority opinion was joined by Chief Justice Burger and Justices Stewart, Rehnquist and Stevens.

[64] 444 U.S. at 685, 686 n.22.

> judgment acts primarily in his own interest and therefore does not represent the interest of his employer, the Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. The Court of Appeals found no justification for this distinction, and we perceive none. In fact, the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.[65]

The Court stated that "[t]he controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial."[66] In affirming the judgment of the court of appeals, the Court concluded that the Board's conclusions were neither "rationally based on articulated facts" nor "consistent with the Act."[67]

Emphasizing the distinction between the interests of the professors and the interests of the employer, the dissenting opinion[68] endorsed the Board's theories. Writing for the dissent, Justice Brennan argued that the faculty members were not expected to conform to management policies, were not accountable to the administration in its governance function, and were not "representative of management"; thus, he concluded that they should not be considered managerial employees.[69] This argument, however, fails to rebut satisfactorily the points made by the majority. The dissent did not dispute the majority's conclusion that the faculty's authority was "unquestionably managerial." Nor did the dissent demonstrate on the facts of this case that the professional interests of the faculty were wholly distinct from the interests of the university, an essential point for reaching the minority's conclusion.

The sum of the Supreme Court's *Yeshiva* decision is that private university faculty members who sit on committees

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[65] *Id.* at 688.

[66] *Id.* at 686.

[67] *Id.* at 691.

[68] Justice Brennan's dissent was joined by Justices White, Marshall and Blackmun.

[69] 444 U.S. at 699.

which exercise managerial functions will be considered managerial employees.[70] As such, those faculty members will be excluded from a bargaining unit of professional employees.[71] This decision, as a matter of legal analysis, unquestionably is correct.[72]

Faculty members who work together on committees governing appointment and tenure, grievance adjustment, or similar management oriented areas clearly exercise supervisory or managerial authority when they act collectively. The contrary position of the Board that collective activity, merely because it is collective, diffuses supervisory authority to the extent that a committee can exercise authority, but the individuals who make up the committee cannot, is unrealistic. The Board's view overlooks the dynamics of a committee decision wherein each participant exercises his independent, and supervisory or managerial, judgment. The Board's diffusion principle is simply without sound analytical support.

Similarly unsound is the Board's theory that faculty committees act more on behalf of the faculty than in the interest of the university-employer. The Second Circuit and the Supreme Court effectively rebutted this argument with extensive discussions of the common interests of university and faculty and the concept of shared authority in university governance. These courts performed a "realistic assessment of the way in which a university such as Yeshiva functions."[73] Indeed, the

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[70] See text accompanying note 32 *supra* for the definition of managerial employees adopted by the *Yeshiva* majority.

[71] Presaging the Supreme Court's holding in *Yeshiva*, one commentator asserted that proper recognition of the existence of real authority in the university governance context would require the exclusion from a faculty bargaining unit of any faculty member who regularly participated in the decisionmaking process concerning employment, promotion, transfer, suspension, discharge, or grievance adjudication (if such process required the exercise of independent judgment). Wollett, *Faculty Collective Bargaining in Higher Education: An Organizational Perspective*, 3 J.L. & ED. 425 (1974). Although Wollett casts his exclusion in supervisory terminology and the Court rested instead on the managerial exclusion, it is clear that the intent and practical effect of either theory is the same.

[72] The debate over the wisdom of the *Yeshiva* decision as a matter of policy has already reached the floor of Congress. During the past session, legislation was introduced to reverse the Court's holding by amending the statutory definition of supervisor in § 2(11) of the Act.

[73] 582 F.2d at 700.

faculty and the university are often, as in the instance of Yeshiva, one and the same. Thus the collective action of the faculty in supervisory matters must be viewed as being in the employer's interest, as well as in that of the faculty.

The *Yeshiva* decision clearly will have a profound effect upon the size of the professional employee bargaining unit at universities generally. The holding will be detrimental, and perhaps devastating, to faculty collective bargaining at smaller universities, and will prove particularly harmful to new efforts to organize faculty and institute collective bargaining. While faculty attempts to bargain collectively may be rendered futile by *Yeshiva*'s exclusion of numerous faculty members from the bargaining unit, the decision is logically based on sound legal principles.

B. *Department Chairmen*

Another dimension of the supervisory or managerial employee issue, and one not directly addressed by the Court in *Yeshiva,* is the inclusion of department chairmen[74] in the bargaining unit. *Yeshiva* does, however, furnish guidelines for proper resolution of this issue and indicates that the Board's solutions in this area will fare somewhat better than did those in the faculty committee context.

In determining whether a department chairman is a supervisor, the Board must decide whether the chairman fits within the statutory definition of supervisor. Since the statute poses reasonably straightforward factual criteria,[75] the Board's decisions have rested upon a balancing of the facts of each case.

In *C.W. Post*[76] and *Long Island University,*[77] the Board established the pattern for balancing the factual criteria of section 2(11). The Board noted that the most important crite-

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[74] *See generally* Menard, *Exploding Representation Areas: Colleges and Universities,* 17 B.C. INDUS. COM. L. REV. 931, 945-57 (1976) (discussion of the supervisory status of department chairmen).

[75] See text accompanying note 31 *supra* for a description of the criteria used to determine whether an employee is a supervisor.

[76] 189 N.L.R.B. 904 (1971).

[77] *Id.* at 909.

rion for resolving the supervisory issue in the faculty context is whether the chairman has the authority to make effective recommendations on hiring, promotion, discharge, work direction and grievance adjustments. Concluding that the department chairmen were supervisors in *Post,* the Board stated that "[t]he . . . facts established that deans and department chairmen . . . exercise the authority to make effective recommendations as to the hiring and change of status of faculty members and other employees."[78] Absent such authority, the chairmen would not be considered supervisors and could be included in the bargaining unit. Allegations that a chairman possesses supervisory authority could be defeated either by showing that the chairman does not have authority individually to act or recommend on supervisory matters, as in the *Fordham University* cases,[79] or that if he has such authority, that his recommendations are not effective, as in *University of Detroit.*[80]

In *Fordham* the collegial system of group authority was viewed as overruling any contention that the chairmen there acted as supervisors.[81] Clearly, the *Fordham* rationale is an application of the *Post* collective authority principle: when supervisory authority is exercised collectively, no individual of

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[78] *Id.* at 906. Subsequent decisions on the supervisory status of chairmen have followed the pattern established by these early cases. Where chairmen had authority to recommend such things as hiring, promotion, and discharge, they were excluded from the bargaining unit. *See* University of Vt., 223 N.L.R.B. 423 (1976); New York Univ., 221 N.L.R.B. 1148 (1975); Rensselaer Polytechnic Inst., 218 N.L.R.B. 1435 (1975); Fairleigh Dickinson Univ., 205 N.L.R.B. 673 (1973); Syracuse Univ., 204 N.L.R.B. 641 (1973); Adelphi Univ., 195 N.L.R.B. 639 (1972).

[79] 214 N.L.R.B. 971 (1974); Fordham Univ., 193 N.L.R.B. 134 (1971).

[80] 193 N.L.R.B. 566 (1971). Subsequent Board decisions have held that a department chairman is not a supervisor where the existence of a committee or collegial system precluded the formulation of the chairman's own opinions into committee recommendations, or where the chairman's recommendations were not followed frequently enough to conclude that those recommendations were effective. *See* Boston Univ., 238 N.L.R.B. 1008 (1977); Yeshiva Univ., 231 N.L.R.B. 597 (1977); Fairleigh Dickinson Univ., 227 N.L.R.B. 239 (1976); Northeastern Univ., 218 N.L.R.B. 247 (1975); New York Univ., 205 N.L.R.B. 4 (1973); Rosary Hill College, 202 N.L.R.B. 1137 (1973); Tusculum College, 199 N.L.R.B. 28 (1972).

[81] In the first *Fordham* decision, the Board stated that "it is apparent that decisions as to appointment, promotion, and tenure are in fact made not by the chairman alone, but by the faculty of the department, acting as a group." 193 N.L.R.B. at 138.

the collective group shall be considered a supervisor.[82] The Supreme Court's emphatic rejection of the *Post* principle in *Yeshiva* effectively renders the rationale advanced in *Fordham* useless. The *Detroit* theory that chairmen are not supervisors if their recommendations are not automatically effectuated, however, retains vitality because it does not focus on how the chairman's recommendation is formulated but rather is based on what happens to that recommendation once it has been made.[83]

Thus, the general standard for determining the status of chairmen vis-à-vis their professional colleagues involves an examination of complicated interrelationships of individuals and committees, faculties and administrations. Even though an inquiry into the individual chairman's personality and political acumen may be more revealing than an objective examination of the office he holds for purposes of determining the effectiveness of his recommendations,[84] the Board's examination is limited to scrutiny of the chairman's office. Even with this objectivity, the resolutions are not simple to perform. As the Board observed in *New York University:* "Attempting to identify and resolve the complex threads, and even the nuances, of the relationship among the faculty, administration, and department chairmen is not an easy task, nor one usually susceptible to a completely satisfactory conclusion."[85] Nevertheless, the Board has fashioned a reasonably workable means

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[82] As the Board stated in *Northeastern*: "But in arriving at a conclusion on this issue the Board has given consideration to the principle of 'collegiality.' In appropriate cases where the chairman's powers have been effectively diffused among the department faculty pursuant to the principle of collegiality, the Board has included the chairmen." 218 N.L.R.B. at 251-52.

[83] In both *Detroit* and *Fordham*, the Board viewed as significant the fact that the chairmen considered themselves, and were considered by the university and faculty, to be one of or a representative of the faculty, and not a part of the administration. Detroit Univ., 193 N.L.R.B. at 568; Fordham Univ., 189 N.L.R.B. at 139. *See generally* Moore, *supra* note 1, at 48. Although this may be true generally, it is questionable whether this self-image or perceived role has any legal significance. Factors of self-image are not a part of the Act's definition of supervisor.

[84] "The Board's inability to recognize the real exercise of supervisory authority is understandable. In most campuses, the exercise of authority is a fluid process beyond the ken of all but the most energetic professor-politicians." Moore, *supra* note 1, at 55.

[85] 205 N.L.R.B. at 9.

of measuring the supervisory status of department chairmen.

The Board's *factual* determinations as to the supervisory status of department chairmen have been challenged twice in the courts of appeals. In *NLRB v. Wentworth Institute,*[86] the First Circuit Court of Appeals held that the chairmen were supervisors in that hierarchical governance system. In *Trustees of Boston University v. NLRB,*[87] however, the First Circuit agreed with the Board's determination that the department chairmen there were not supervisors.[88] In upholding the Board, the court stated that its "analysis of whether chairpersons are excluded supervisors or managerial employees looks to the degree of control exercised by chairpersons over other bargaining unit personnel and the relative amount of interest they have in furthering the policy of the administration as opposed to the members of the bargaining unit."[89] The court noted that the chairmen at Boston University made recommendations as to appointments, reappointments, promotions and discipline based on consultation with the faculty but that the president and Board of Trustees made the final determinations on such matters.[90] The court held that the collegial principle defeated any inference of supervisory status. Further, the court stated that the chairmen did not exceed the fifty percent rule in their supervision of nonunit employees.[91] Using this reasoning, the court enforced the Board's bargaining order.

In *Boston,* the First Circuit adopted the principle which the Second Circuit, and subsequently the Supreme Court, rejected in *Yeshiva.* In *Yeshiva,* the Court spurned the Board's argument that diffusion of supervisory or managerial responsibilities functioned to preclude a finding of supervisory or managerial status for the faculty members involved. The *Boston* court conceded that the university chairmen's recommendations as to the appointment and reappointment of full-time

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[86] 515 F.2d 550 (1st Cir. 1975).

[87] 575 F.2d 301 (1st Cir. 1978).

[88] *Id.* at 305.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 306. For a discussion of the 50% rule, see notes 95-104 *infra* and accompanying text.

faculty were followed "more often than not."[92] However, the fact that the chairmen consulted with the faculty in making their recommendations led the court to the conclusion that "the Board was entitled to find that the chairperson's recommendations were not 'effective' or that he/she was acting 'in the interest' of the faculty, not of the employer."[93] Ultimately the Supreme Court vacated the First Circuit's decision in *Boston* and remanded it to the court of appeals.[94] This remand, along with the *Yeshiva* decision, makes it clear that the Board's *Post* principle of collective or collegial exercise of supervisory authority will no longer be considered a valid legal proposition. Thus, collective exercise of authority does not preclude a finding that chairmen are supervisors within the meaning of the National Labor Relations Act.

Yeshiva, however, only destroys the argument that a *diffusion* of a chairman's ability to formulate effective personnel recommendations is sufficient to defeat a finding of supervisory status. The statutory test that supervisory status can rest upon a department chairman's authority to make effective recommendations remains valid. Now, however, this determination must be made without the crutch of the *Post* principle.

C. *Professional Employees Who Perform Supervisory Functions Over Non-Professional Employees*

In resolving the question of supervisory or managerial status for faculty members, an issue involving the professional employee's performance of supervisory functions over nonprofessional employees also arises. The question raised is whether a professional employee, frequently a department chairman, will be excluded from the bargaining unit of professional employees because that employee supervises nonunit, nonprofessional employees. *Yeshiva* did not address this issue; in this area, Board decisions provide the controlling law. The NLRB has resolved the question by using a balancing test.

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[92] *Id.* at 305.

[93] *Id.* at 306.

[94] 445 U.S. 912 (1980). On remand the court of appeals must determine whether the department chairmen of Boston University possess the authority to make effective recommendations concerning hiring and firing.

Relying on its industrial precedent, the Board in *Adelphi*[95] adopted the *Westinghouse* fifty percent supervisor rule.[96] This rule provides that a professional employee is not considered a supervisor or managerial employee merely because he has authority to perform supervisory functions over nonunit employees if the majority of his time is spent performing nonsupervisory unit work.[97] The Board stated the rationale for the fifty percent rule in *Adelphi*:

> [A]n employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over nonunit personnel. No danger of conflict of interest within the unit is presented, nor does the infrequent exercise of supervisory authority so ally such an employee with management as to create a more generalized conflict of interest of the type envisioned by Congress in adopting Section 2(11) of the Act.[98]

The clear intent of the fifty percent rule is to balance the competing interests of the professional employee as a bargaining unit employee and as a supervisor. Although the efficacy of the rule in accomplishing this goal is less than clear,[99] it has the advantage of ease of application.

The rule has been applied on several occasions to defeat allegations of supervisory status. In *Adelphi,* the fifty percent rule resulted in the inclusion of the director of admissions in

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[95] 195 N.L.R.B. 639 (1972).

[96] 163 N.L.R.B. 723, 727 (1967). *See generally* Menard, *supra* note 73 at 951 for a discussion of the rule.

[97] Adelphi Univ., 195 N.L.R.B. at 644.

[98] *Id.*

[99] Finkin argues that the 50% rule "seems admirably suited" and preserves the "integrity of the professional group." Finkin, *supra* note 38, at 640. Numerous factual possibilities, however, can be envisioned where a strict application of the rule would have the opposite effect. For example, a professor who spent 45% of his work time in the classroom teaching and 55% of his work time in a research facility supervising graduate research assistants would be little different from a professor who performed similar duties but in reverse proportion, yet the 50% rule would exclude the former and include the latter in a bargaining unit of professional employees. The 50% distinction is rendered even more inaccurate in this hypothetical by the nature of the "supervisory" task involved because the supervision of graduate assistants, who are generally university employees, is functionally analogous in many respects to classroom instruction.

the bargaining unit of professional employees.[100] Similarly, the rule has been applied to include professional librarians,[101] "core" faculty of a graduate school,[102] and chairmen[103] in the bargaining unit. The Board viewed this result as comporting with the reality of professional employees' duties and needs.

> [P]rofessional employees frequently require the ancillary services of nonprofessional employees in order to carry out their professional, not supervisory, responsibilities. But that does not change the nature of their work from professional to supervisory, nor their relation to management. They are not hired as supervisors but as professionals. The work of employees that may be "supervised" by professionals in this category is merely adjunct to that of the professional and is not the primary work product.[104]

Generally, the fifty percent rule provides a workable and approximate index of managerial interest. The rule permits a college professor to hire, fire, and direct his secretary and his typist and remain, for collective bargaining purposes, a college professor.

In summary, a faculty member's inclusion in the bargaining unit depends, in part, on his status as a supervisor or managerial employee. *Yeshiva* holds that a faculty member who exercises authority over personnel decisions, even if that authority is only exercised through a committee, will be excluded from the bargaining unit. Department chairmen will be included in the unit only if they lack the capacity to individually exercise supervisory authority or to make effective recommendations on supervisory matters. A faculty member will not be excluded from the employee unit, however, for supervision of nonprofessional employees unless that supervision encompasses the majority of his time. Thus, given *Yeshiva* and Board decisions as precedents, a determination of supervisor/

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[100] Adelphi Univ., 195 N.L.R.B. 639 (1972).

[101] Mt. Vernon College, 228 N.L.R.B. 1237 (1977); New York Univ., 221 N.L.R.B. 1148 (1975).

[102] Goddard College, 234 N.L.R.B. 1111 (1978).

[103] New York Univ., 205 N.L.R.B. 4 (1973).

[104] New York Univ., 221 N.L.R.B. at 1156. This analysis does not necessarily hold true in the university context. *See* note 99, *supra*.

managerial status now can be made without considerable difficulty.

III. THE COMMUNITIES OF INTEREST ANALYSIS

A faculty member's status as a supervisor or managerial employee is not the only issue involved in defining the appropriate faculty bargaining unit. Another question to be resolved is the extent to which the faculty member shares his colleague's aims and concerns.

The major guiding principle in the definitional process of fixing the scope and composition of a bargaining unit thus is the concept of community of interests. The National Labor Relations Act charges the Board with responsibility to define a bargaining unit that will "assure to employees the fullest freedom to exercise the rights guaranteed by this [Act]."[105] This duty has been interpreted to mean a gathering into a single unit of those employees who share economic and other job-related interests, excluding from the unit those employees whose interests are divergent from those of the community. Indeed, the statutory exclusion of the supervisory employee and the case law exclusion of the managerial employee are prime examples of the exclusionary effect of the community of interest principle.

A threshold question in representation litigation before the Board is the issue of defining an appropriate bargaining unit; in fact, assertion of jurisdiction by the Board is the only problem which precedes unit definition. Accordingly, after asserting jurisdiction over universities in *Cornell,* the Board in that case plunged into the bargaining unit controversy, utilizing the precedent of the community of interest criterion developed in the Board's adjudication of industrial disputes.

> In determining whether a particular group of employees constitutes an appropriate unit for bargaining where an employer operates a number of facilities, the Board considers such factors as prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or au-

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[105] 29 U.S.C. § 159(b) (1976).

> tonomy of the plants, differences or similarities in skills and functions of the employees, and geographical location of the facilities in relation to each other. We are mindful that we are entering into a hitherto uncharted area. Nevertheless, we regard the above principles as reliable guides to organization in the educational context as they have been in the industrial, and will apply them to the circumstances of the instant case.[106]

The Board concluded that a separate statewide bargaining unit for library employees was not warranted.

Since the employees in *Cornell* were clerical employees and not the professional persons the Board was soon to encounter, the determination of the bargaining unit's scope was not a particularly novel or unusual task, except that the Board was dealing for the first time with an employer whose business was higher education. The Board since has encountered no particular difficulty in applying the enumerated community of interest criteria to any group of university employees, including faculty.[107] The scope of the unit sought has been an additional consideration in the Board's balancing of the facts,[108] and concern with the scope of the representation sought has led to the concept of unit fragmentation. In the university faculty cases, the Board occasionally has granted clearly separate, smaller groups of employees an opportunity to choose not to be included with the main unit of general university faculty; thus far, however, fragmentation has been limited to professional schools, usually law schools.[109]

In cases where separate representation is sought for a professional school, the Board must inquire into the justifia-

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[106] Cornell Univ., 183 N.L.R.B. at 336. Other traditional community of interest criteria include similarity in the scale and method of determining salary, benefits, hours and other conditions; similarity in the kind of work performed; similarity in the qualifications, skills and training of the employees; continuity or integration of production; desires of the employees; and the extent of organization among the employees. *See* A. COX, D. BOK, & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 300 (8th ed. 1977).

[107] *See, e.g.*, Goddard College, 234 N.L.R.B. 1111 (1978); Fairleigh Dickinson Univ., 205 N.L.R.B. 673 (1973).

[108] Fairleigh Dickinson Univ., 205 N.L.R.B. at 675.

[109] Separate representation must be actively sought or the professional school is included in the main university bargaining unit. *Id.* at 676.

bility of the separation. In *Fordham,* the first case to allow unit fragmentation, the Board held that "the law school faculty constitutes an identifiable group of employees whose separate community of interests is not irrevocably submerged in the broader community of interest which they share with other faculty members."[110] The *Fordham* Board isolated several factors which justified its decision: the separate accreditation of the law school, the specialized training of the law faculty, the separate and exclusive building, the independent administration, the independent determination of working conditions, the independent calendar, and the lack of interchange between law and lay faculty.[111] In the Board's view, these factors suggested that the law faculty was an identifiable group which was not "so highly integrated" with the university as a whole to compel a single bargaining unit.[112]

Subsequent fragmentation cases have found separate units to be appropriate for both law[113] and medical schools.[114] As a rule, these decisions have not contributed new elements to the analysis, but the rationale for the *Fordham* test finally

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[110] 193 N.L.R.B. at 137. Writing in another forum, Member Kennedy stated that fragmentation of a faculty bargaining unit by severing a group of employees would be justified where "the differences between the two groups of employees in terms of their conditions of employment are so significant that inclusion in a single unit would preclude meaningful bargaining." Kennedy, *Unit Determination in Colleges and Universities,* 1974 LAB. REL. Y.B. 151, 161.

[111] 193 N.L.R.B. at 137.

[112] *Id.* Scholarly review of *Fordham* and decisions in subsequent similar cases has been critical. Commentators have not taken issue with the concept of fragmentation, which bears a strong analogy to the concept of industrial craft units, but they have objected strongly to the Board's resolutions of the issue, finding the Board's reliance on divergencies between professional school faculty and the balance of the university faculty to be unpersuasive and exaggerated, and stressing, instead, the common function of teaching and the common goal of education. *See,* Brousseau, *supra* note 27, at 644; Finkin, *supra* note 38, at 633-34; and Menard, *supra* note 73, at 974-75. These criticisms tend to overlook or to minimize the reality that professional school faculty members possess an economic potential outside the university which the ordinary faculty typically cannot match. This economic potential gives the professional school professor a real bargaining power in excess of that of other professors.

[113] *See* University of Miami, 213 N.L.R.B. 634 (1974); University of San Francisco, 207 N.L.R.B. 12 (1973); Catholic Univ., 205 N.L.R.B. 130 (1973); New York Univ., 205 N.L.R.B. 4 (1973); Syracuse Univ., 204 N.L.R.B. 641 (1973).

[114] *See* University of Vermont, 223 N.L.R.B. 423 (1976); University of Miami, 213 N.L.R.B. 634 (1974).

was explained in *Syracuse University.*[115] All the factors of *Fordham* were present in *Syracuse University,* thereby rendering the law school at Syracuse "virtually autonomous." Beyond these objective items, the Board noted a subjective element which set the university situation clearly apart from the industrial bargaining model, stating:

> [F]aculty may have an interest in, even a paramount allegiance to, a particular discipline. This allegiance may transcend shared interests in the economic benefits and the conditions of employment.
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> . . . Because of those special interests, which have uncommon importance in this context, we believe we must be especially watchful in guarding the rights of minority groups whose intellectual pursuits and interests differ in kind from the bulk of the faculty. Granting a voice merely in determining whether such a group shall be swallowed up by the collective body or shall have separate representation will not answer. Rather it requires yet another choice, that of standing alone without representation regardless of the choice of the university body as a whole.[116]

In *Syracuse,* then, with unusual eloquence, the Board determined that faculty of professional schools should be permitted to decide by ballot for representation with the rest of the university faculty, for separate representation, or for nonrepresentation.

The unit fragmentation procedure was sustained by the First Circuit Court of Appeals in its *Boston University*[117] decision. The court rightly observed that some of the separating factors that had been applied to the law school applied equally to several other professional schools that had been included in the main university unit. The presence of other distinguishing factors, however, such as a separate admissions office, library, calendar, salary schedule and tenure periods, precluded the court from finding that the Board had acted in an arbitrary fashion. The court concluded that because the findings of the Board were supported by substantial evidence,

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[115] 204 N.L.R.B. 641 (1973).
[116] 204 N.L.R.B. at 643.
[117] 575 F.2d at 306-08.

the Board had not abused its discretion.[118]

Sufficiently significant differences, therefore, may justify segregating groups of faculty who collectively possess certain unique characteristics that effectively set those faculty members apart from the rest of the staff. This separation in no way poses a challenge to these faculty members' basic identification as faculty. Such segregation, illustrated by the *Boston* decision and others, wholly comports with the requirement of the Act that the Board select an appropriate unit for bargaining,[119] and finds precedential support in the craft unit decisions of the Board in the industrial sector.

A. *Adjunct or Part-Time Faculty*

The area of the unit determination controversy showing the greatest confusion and change has been that of the adjunct professor. Following industrial precedent, the Board in early cases[120] included part-time faculty in the bargaining unit. This result was reached through development of a somewhat artificial unit determination test to be applied to the adjunct faculty members. Known as the "functions and qualifications" test, the rule was articulated first in *C.W. Post Center of Long Island University.*[121]

In *Post,* the Board included adjunct faculty in the bargaining unit. Focusing on the qualifications and function of the part-time employees, the Board concluded that the two faculty groups shared similar characteristics; both full-time and part-time professors are professional employees, both have professional qualifications, and both pursue the teaching function.[122] This test of function and qualification soon was followed in *University of New Haven,*[123] which expressly relied on the *Post* decision. The Board in *New Haven* reiterated

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[118] *Id.* The Supreme Court's vacation and remand of the First Circuit's decision for reconsideration in light of *Yeshiva* should have no real effect on this issue because *Yeshiva* did not present or address the unit fragmentation question.

[119] 29 U.S.C. § 159(a) (1976).

[120] See notes 122-27 *infra* and accompanying text for a discussion of these early cases.

[121] 189 N.L.R.B. 904 (1974).

[122] *Id.* at 905-06.

[123] 190 N.L.R.B. 478 (1971).

the focus on qualification and work function but added two elements to the part-time professor problem; the Board restricted inclusion in the faculty unit to "regular" part-time faculty and allowed the parties the option to agree to exclude part-time personnel.[124]

The first *New Haven* addition to the *Post* part-time rule, restricting its consideration to "regular" part-time faculty, created immediate difficulties. For example, in *New Haven* the Board included in the "regular" part-time faculty category adjuncts who spent as little as three hours per week in the classroom, when the normal full-time teaching load was twelve hours per week.[125] Subsequently, the Board in *University of Detroit*[126] elevated this ratio to the status of a test for the meaning of "regular." In *Detroit,* the Board decided to include the quarter-time professor because, in the view of the Board, he had "a substantial and continuing interest in the wages, hours, and working conditions of unit employees."[127]

Despite the lip service given to the fundamental bases of the community of interest principle, the apparent focus of the Board in *Detroit,* as in *Post* and *New Haven,* was on professional qualifications and work function. Seemingly, the Board accorded little weight to the fact that New Haven adjunct professors did not participate in most fringe benefits, had no opportunity to attain tenure, and would not be hired if there were no student demand for the courses they taught. Comparable factors similarly were passed over in several subsequent cases where the part-time faculty was included in the bargaining unit on the grounds of similar function and qualifications.[128]

The approach in the part-time faculty cases was problematic in that it was not at all consistent with the normal community of interest standards which the Board purported to

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[124] *Id.* These two elements are not at all unique to the university context.

[125] *Id.* at 478.

[126] 193 N.L.R.B. 566 (1971).

[127] *Id.* at 567.

[128] *See* Catholic Univ. of America, 201 N.L.R.B. 929 (1973); College of Pharmaceutical Sciences, 197 N.L.R.B. 959 (1972); Florida Southern College, 196 N.L.R.B. 888 (1972); Manhattan College, 195 N.L.R.B. 65 (1972); Fordham Univ., 193 N.L.R.B. 134 (1971); Long Island Univ., 189 N.L.R.B. 909 (1971).

apply. The Board finally admitted the error of the *Post-New Haven-Detroit* line of cases in *New York University*.[129] The *New York* opinion, remarkable for the extent and quality of its exposition, expressly abandoned the *New Haven* inclusionary rule and reversed the previous posture of the Board:

> [A]fter careful reflection, we have reached the conclusion that part-time faculty do not share a community of interest with full-time faculty and, therefore, should not be included in the same bargaining unit. . . . We are now convinced that the differences between the full-time and part-time faculty are so substantial that we should not adhere to the principle announced in the *New Haven* case. We shall *exclude* all adjunct professors and part-time faculty members who are not employed in "tenure track" positions.[130]

Moreover, the Board specifically admitted in a footnote to the decision that its previous decisions on the adjunct professor issue failed to establish a workable standard.[131]

Accordingly, the Board elected to examine more carefully the factors which comprise community of interest and concluded in *New York* that the differences in compensation, participation in university government, tenure eligibility, and working conditions that existed between part-time and full-

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[129] 205 N.L.R.B. 4 (1973). The abandonment of the *New Haven* rule represented a recognition by the Board that the rule suppressed and excluded from consideration too many elements of the community of interest test and that the cases decided under that rule frequently rested on a very narrow factual base, despite the fact that the community of interest test itself is a very broad standard.

[130] *Id.* at 6. One commentator observed that "[t]he new rule has the decided advantage of ease of application. In addition, it does rough justice, for the most cases where academic tenure is available the position would be considered as comprising part of the core faculty." Finkin, *supra* note 38, at 631-32.

[131] The Board stated:

> Justice Stewart in *Boys Market Inc. v. Retail Clerks*, 398 U.S. 235 (1970), quoted with approval Justice Frankfurter's earlier observation that "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."
>
> Our abandoment [sic] of the *New Haven* rule is the result of arguments advanced by the parties in this and other pending cases as to the function, nature, and character of part-time faculty members. We have also been influenced by the Board's inability to formulate what we regard as a satisfactory standard for determining the eligibility of adjuncts in Board elections.

205 N.L.R.B. at 6 n.9.

time faculty precluded a finding of real "mutuality of interest" between the two groups.[132] The *New York* rule of part-time faculty exclusion, however, is not an absolute rule, for it does allow the inclusion of faculty on the "tenure track."[133] Although part-time faculty eligible for tenure are likely to be rare, the Board may include a part-time professor on the ground that tenure is available to him.

Additionally, in *Kendall College,*[134] the Board included in the faculty bargaining unit part-time faculty members who were employed on a "pro-rated" full-time contract but excluded part-time faculty members employed on a "per-course" contract.[135] The Board suggested that the part-timers with "pro-rated" full-time contracts had interests that were substantially closer to those of the full-time faculty than were those of the part-timers employed on a "per-course" basis.[136] Thus, *Kendall* illustrates that when the facts of a case so require, the exclusionary rule of *New York,* based on community of interest grounds, will yield to a showing of a real community of interest.

Subsequent decisions of the Board have followed the *New York* rule.[137] Moreover, in *Catholic University,*[138] the Board reconsidered on its own motion a decision rendered five

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[132] *Id.* at 7.

Shortly thereafter, the Board buttressed its *New York* decision in University of San Francisco, 207 N.L.R.B. 12 (1973). In *San Francisco,* the Board again directed its attention to the real economic and academic differences between the full-time and adjunct law professor. Adjunct professors at the San Francisco law school did not work under a formal contract, did not receive fringe benefits, did not have an office at the school, did not participate in governance of the school, did not draw regular salary, and were not eligible for tenure. Given this list of distinctions, the Board felt "constrained to conclude that part-time faculty, or adjunct professors, do not have a community of interest with the full-time faculty." *Id.* at 13. As in *New York,* part-time professors were excluded from the bargaining unit of regular law faculty.

[133] 205 N.L.R.B. at 6.

[134] 228 N.L.R.B. 1083 (1977), *enforced,* 570 F.2d 216 (7th Cir. 1978).

[135] *Id.*

[136] *Id.* Those part-time faculty members employed on a "pro-rated" full-time contract generally were either dual-function employees, performing administrative and teaching duties, or former full-time employees. 570 F.2d at 220.

[137] *See, e.g.,* Yeshiva Univ., 221 N.L.R.B. 1053 (1975); Northeastern Univ., 218 N.L.R.B. 247 (1975); University of Miami, 213 N.L.R.B. 634 (1974); Fairleigh Dickinson Univ., 205 N.L.R.B. 673 (1973); Catholic Univ., 205 N.L.R.B. 130 (1973).

[138] 205 N.L.R.B. 130 (1973).

months before *New York* and reversed a decison which had relied on *New Haven.*[139] The Board has enjoyed the unanimous approval of its *New York* rule in the courts of appeals,[140] and for this reason the law on the issue of the part-time professor seemingly is settled by *New York.*[141]

B. *Support Personnel*

The term "support personnel," if broadly defined, can include all nonteaching university employees. For potential inclusion in a faculty bargaining unit, the particular office or position of the nonteaching employee in question must satisfy several prerequisites. A threshold requirement for the inclusion of a nonteaching university employee in a faculty bargaining unit is a finding that the employee, like the faculty member, is a professional employee.[142] Once professional employee status is established, the educational work function

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[139] *Id.*

[140] Yeshiva Univ., 231 N.L.R.B. 597 (1977), *enforcement denied,* 582 F.2d 686 (2nd Cir. 1978), *aff'd,* 444 U.S. 672 (1980); Trustees of Boston Univ., 228 N.L.R.B. 1008 (1977), *enforced,* 575 F.2d 301 (1st Cir. 1978), *vacated and remanded,* 445 U.S. 912 (1980); Kendall College, 228 N.L.R.B. 1083 (1977), *enforced,* 570 F.2d 216 (7th Cir. 1978).

[141] The *New York* rule of presumptive exclusion of part-time faculty from a bargaining unit of full-time faculty has not received universal acclaim among commentators. Menard proposed a presumption of inclusion, rebuttable by a showing "that part-time employment is so intermittent that exclusion is justified or that the nature of their contractual arrangement with the institution is so significantly different from that of regular full-timers that [exclusion] is warranted." Menard, *supra* note 74, at 945. Menard's proposal tends, however, to look narrowly toward the same sort of analysis initially undertaken by the Board under the *New Haven* rule and thus would seem to invite extended litigation on frequency of employment and differences between employment contracts, while overlooking other equally important factors.

[142] Strictly speaking, a finding of professional status for a particular nonteaching employee or a particular group of such employees is not necessary in order to include those employees with teaching or professional employees. However, an election in such a proposed unit is a rather complicated procedure. Section 9(b)(1) of the Act requires that before the Board can certify a unit of employees which would include both professional and nonprofessional employees, the professional employees must be afforded an opportunity to vote on the issue. Thus, professional employees vote on two issues: (1) for or against representation, and (2) for or against inclusion of the nonprofessional in their unit. Leedom v. Kyne, 358 U.S. 184 (1958); Sonotone Corp., 90 N.L.R.B. 1236 (1950). To avoid such a complicated election and to have nonteaching support personnel nonetheless included in a faculty unit necessitates a finding of professional employee status for the support employee.

test must be satisfied;[143] given the inherent breadth of the term, "educational work function," this is easily accomplished.

For example, having determined that a specific group of librarians (those with advanced degrees in library science) satisfied the requisite elements, the *Post* Board included the librarians in the faculty bargaining unit.[144] Librarians satisfy the educational function test because a large part of the educational process is research-oriented. Moreover, the Board has stretched its work function test beyond the closely allied area of research to include clinical psychologists on the staff of a university's counseling center.[145] Inclusion of the psychologists was based on the Board's view that the function of the university-employed clinical psychologist constituted "supportive activities clearly associated with the educational process."[146]

The educational work function test implicates the supervisory employee problem because certain employees perform a double function. Employees, such as head librarians, are professional employees performing an educational work function; at the same time they also supervise nonunit, and perhaps unit, personnel. Falling back on the usual supervisor tests, the Board has excluded from the faculty bargaining unit head librarians who supervise professional unit employees[147] and has employed the *Westinghouse-Adelphi* fifty percent rule where the supervision is over nonunit employees.[148]

Additionally, administrative personnel are excluded from the bargaining unit under the work function test if the primary duties of the employee are administrative.[149] Exclusion, however, is premised upon the absence of sufficient commu-

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[143] C.W. Post Center of Long Island Univ., 189 N.L.R.B. 904 (1971).

[144] *Id.* Librarians have since been included in faculty units with fair regularity, and the decisions have rested upon findings of professional employee status and educational work function. *See, e.g.*, University of San Francisco, 207 N.L.R.B. 12 (1973); Tusculum College, 199 N.L.R.B. 28 (1972); Florida Southern College, 196 N.L.R.B. 888 (1972); Long Island Univ., 189 N.L.R.B. 909 (1971).

[145] Northeastern Univ., 218 N.L.R.B. 247 (1975).

[146] *Id.* at 252.

[147] University of San Francisco, 207 N.L.R.B. 12 (1973).

[148] Northeastern Univ., 218 N.L.R.B. 247 (1975); New York Univ., 205 N.L.R.B. 4 (1973).

[149] Northeastern Univ., 218 N.L.R.B. 247 (1975); Florida Southern College, 196 N.L.R.B. 888 (1972).

nity of interest rather than upon the theory of supervisor status.[150]

The issue of inclusion or exclusion of various support personnel has not generated much controversy, primarily for two reasons. First, support personnel, as a rule, do not constitute a major portion of employees and thus have an insignificant impact on unit determination.[151] Second, the unit composition issues often are narrowed substantially by stipulation prior to litigation before the Board; therefore, the issue often is not presented to the NLRB.

C. *Religious Faculty*

While the law is reasonably settled on the issue of inclusion of part-time faculty and support personnel in the faculty unit, the law with regard to inclusion or exclusion of religious faculty (defined for purposes of this article as faculty members who are also members of religious orders) is anything but clear. In dealing with the religious faculty issue, the Board entered into a new area, for the situation posed was truly unique in the history of the Board. The decisions of the Board reflect its amateur status in the religious faculty context; enforcement of its decisions has twice been denied on the ground that the action of the Board was unreasonable and arbitrary.

The controversy began innocuously enough with *Ford-*

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[150] The application of the work function test to administrative personnel had a dramatic impact on Mercy College, 219 N.L.R.B. 81 (1975). The Board in *Mercy* had entered a bargaining order against the college, declining to rule on a challenge to the ballot cast by the athletic director. The court of appeals, denying enforcement, remanded for a hearing on the challenge, which alleged that the athletic director was not eligible to vote because he was an administrative employee. On remand, the Board found that the athletic director was an administrative employee and thus did not share a community of interest with the faculty. Upon striking his ballot, the union lost the representation election, and the union's charge of refusal to bargain was dismissed. *Id.*

[151] Moore warns that the inclusion of more than a bare minimum of support personnel in a faculty bargaining unit would yield impractical results. Since a faculty unit would likely desire to include in an agreement faculty-oriented issues like governance, research, tenure standards, and chairmen selection procedures, Moore argues that the inclusion of nonteaching personnel "will muddy the situation and require essentially two contracts for one bargaining unit. Thus, the two units may as well be separated initially." Moore, *supra* note 1, at 58.

ham University.[152] Several members of the Fordham faculty were Jesuit priests, but the Board apparently thought this factor was unimportant and included the priests in the bargaining unit.[153] Two years later, the Board in *Seton Hill College*[154] excluded religious faculty from the faculty bargaining unit and overruled *Fordham* to the extent that *Fordham* "may be deemed inconsistent with this Decision."[155] The Board excluded the religious faculty of Seton Hill from the bargaining unit because, in the view of the Board, the divergent interests of the religious faculty members and the complex relationship of those faculty to the college established a sufficient basis for separation of the religious and lay groups. The Board said that since the college was owned by the religious order, the religious faculty members were an integral part of the employer and subject, by virtue of this connection and their religious vows of obedience, to a conflict of interests if included in the unit.[156] The Board reached a like conclusion in *St. Francis College,*[157] where less than ten percent of the faculty were members of the Franciscan order, and ordered separate bargaining units.

Two subsequent Board decisions refined the Board's position on the religious faculty issue. In *D'Youville College,*[158] the college was no longer owned by the affiliated religious order and no more than one-third of the Board of Trustees were permitted to be members of the order. Thus, the four religious faculty members in question were not viewed as part of the employer, thereby, in the opinion of the Board, distinguishing *Seton Hill;* additionally, the parties of *D'Youville* stipulated

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[152] 193 N.L.R.B. 134 (1971).

[153] The Board stated that "[t]here is no evidence that membership in the order is in any way inconsistent with collective bargaining in respect to a Jesuit's salary or other terms and conditions of employment." *Id.* at 138.

[154] 201 N.L.R.B. 1026 (1973).

[155] *Id.* at 1027 n.4.

[156] *Id.* at 1027. The facts of *Seton Hill,* however, are easily distinguishable from those of *Fordham.* At Fordham, the religious faculty represented a minority of the faculty, and the university was primarily laymen-operated. Seton Hill, on the other hand, was owned by the religious order (Sisters of Charity), and 50% of the board of trustees and 60% of the faculty were members of the order.

[157] 224 N.L.R.B. 907 (1976), *enforcement denied,* 562 F.2d 246 (3rd Cir. 1977).

[158] 225 N.L.R.B. 792 (1976).

for inclusion. Similarly, in *Niagara University*,[159] the Board included in the faculty bargaining unit four religious faculty members who were not of the order which "owned and operated" the university.[160] The Board excluded from the unit, however, seventeen religious faculty members who belonged to the "owning" religious order.[161] The net result of these decisions apparently is that membership in a religious order will warrant exclusion from the bargaining unit if the order has substantial ownership and control of the university.

Courts of appeals that have reviewed the Board's unit determinations in the religious faculty area have refused to enforce those decisions. In both *St. Francis*[162] and *Niagara*,[163] the two appellate cases on religious faculty, the Board's rulings were rejected as arbitrary. The religious faculty constituted a minority of the faculty in both cases, and in *Niagara* the religious order involved did *not* own the university and was permitted no more than one-third of the seats on the Board of Trustees.[164] The *Niagara* court observed that exclusion of the religious faculty members on these facts was inconsistent with the *D'Youville* precedent and held that the sole ground for exclusion, the religious faculty's vow of poverty, was unrelated to any relevant criterion for unit determination.[165] Agreeing with the *Niagara* court's position concerning vows of poverty, the Third Circuit Court of Appeals in *St. Francis*[166] addressed the ownership issue on facts similar to *Seton Hill*. The court rejected the Board's claim for exclusion from the unit as being unsupported by the evidence; the court found no difference between the relationships of the religious

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[159] 226 N.L.R.B. 918 (1976), *enforcement denied*, 558 F.2d 1116 (2d Cir. 1977).

[160] *Id.*

[161] *Id.* The Board determined that the university was owned and operated by the religious order. The Court of Appeals for the Second Circuit found this determination to be "totally unsupported by the evidence." Niagara Univ. v. NLRB, 558 F.2d 1116, 1119 n.2 (2d Cir. 1977).

[162] 224 N.L.R.B. 907 (1976), *enforcement denied*, 562 F.2d 246 (3rd Cir. 1977).

[163] 226 N.L.R.B. 918 (1976), *enforcement denied*, 558 F.2d 1116 (2d Cir. 1977).

[164] The court of appeals did not find the university to be owned by the religious order, and therefore did not reach the issue of excluding members of an owning religious order from the bargaining unit.

[165] 558 F.2d at 1120-21.

[166] 562 F.2d at 253, 257.

faculty and lay faculty to the college.[167]

IV. JURISDICTION OVER RELIGIOUS INSTITUTIONS

Curiously, Board decisions to exclude religious faculty from a bargaining unit where that particular religious order has substantial ownership and control of the university utterly fail to confront the jurisdictional question raised by the order's ownership and control of the institution. The Seventh Circuit Court of Appeals was the first tribunal to directly confront the jurisdictional issue.[168] In *Catholic Bishop v. NLRB*,[169] a case which involved parochial high schools, the court held that the Board's assertion of jurisdiction presented a conflict with the religion clause of the first amendment.[170]

In its discussion, the court noted that the issuance of a bargaining order against an employer inevitably has an inhibiting effect upon the employer's managerial habits but observed that, in the usual industrial-commercial context, issuance of the order is supported by sound policy considerations. Nonetheless, the court denied enforcement of the Board's bargaining order, stating that "when that imposition conflicts with the religion clauses . . . the First Amendment protective wall should prevail."[171]

On writ of certiorari, the United States Supreme Court affirmed the Seventh Circuit decision but declined to reach the constitutional issue.[172] Reviewing the statutory history of the National Labor Relations Act and its several amendments, the Court first concluded that there was no clear expression of congressional intent to include teachers in church-operated schools within the scope of the Board's jurisdiction. Second, the Court said that there was "abundant evidence" that such an inclusion would implicate the religion guarantees of the

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[167] *Id.* at 253.

[168] In previous cases, the Board had formulated a policy of declining jurisdiction when it found a school to be "completely religious," while accepting jurisdiction when it characterized a school as "merely religiously associated." Catholic Bishop v. NLRB, 559 F.2d 1112, 1116-18 (7th Cir. 1977).

[169] 559 F.2d 1112 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

[170] *Id.*

[171] *Id.* at 1124.

[172] 440 U.S. 490 (1979).

first amendment.[173] The Court therefore held that the constitutional issue need not be reached because interpretation of statutory language and analysis of legislative history failed to disclose congressional intent to grant jurisdiction to the Board over teachers in church-operated schools.[174]

The immediate impact of the *Catholic Bishop* decision has been to remove not only parochial elementary and secondary schools from the reach of the Act but also to place cases such as *Seton Hill* beyond the Act's scope. The high schools in *Catholic Bishop* were wholly-owned and -operated by the church, and similarly owned and operated colleges and universities now must be considered to be outside the scope of the Board's jurisdiction. This decision, however, does not determine the issue of the Board's jurisdiction over colleges which are supported, governed and/or operated by a blend of laymen and religious orders, because the *Catholic Bishop* decision in truth leaves unresolved what it purported to resolve.

Rejecting the test of "completely religious" versus "merely religiously associated" which the Board had applied in the parochial high school cases, the Supreme Court created a new jurisdictional test of "church-operated."[175] If a school or college is church-operated, the Board does not have jurisdiction. Essentially, the Court merely substituted one substantively indefinite standard for another; it did not escape the litigious task of clearly defining the parameters of the Board's jurisdiction. The "church-operated" test adopted by the Court is, however, a significant step removed from the first amendment difficulties raised by the "completely religious" versus "merely religiously associated" dichotomy used by the Board in the *Catholic Bishop* case.

Since the *Catholic Bishop* decision, the Board has asserted its jurisdiction over schools and colleges which, while having a history of being church-operated, in fact are no

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[173] *Id.* at 507.

[174] *Id.* at 506. Mr. Justice Brennan, writing the dissenting opinion in the 5-4 decision, would have construed the Act broadly so as to uphold the Board's initial finding of jurisdiction and then would have confronted the first amendment issues. *Id.* at 508-18.

[175] *Id.* at 500, 506.

longer church-operated.[176] The Board ruled in *Diocese of Brooklyn*[177] that a private high school governed by a lay board of trustees and operated independently of the Catholic Diocese which had formerly owned and operated the school "is an entity separate and distinct from the church."[178] The Board concluded that the school was not church-operated even though over half of the faculty of the school had been members of the faculty when the school had parochial status, a substantial portion of the faculty were members of religious orders, religious courses were required of all students, and all faculty members had defined religious instruction responsibilities.[179] Similarly, the Board asserted jurisdiction in *College of Notre Dame*[180] and *Barber-Scotia College, Inc.*,[181] basing its decisions on the facts of independent boards of trustees and lack of financial and administrative connections between the college and the formerly controlling religious institution.

The two college cases, *Notre Dame* and *Barber-Scotia,* were clouded by the Board's discussion of the differences between secondary and higher education as a ground for distinguishing *Catholic Bishop.* Differences clearly exist between these educational levels, but none mentioned was germane to the jurisdictional questions outlined by the Supreme Court in *Catholic Bishop;* the standard announced in *Catholic Bishop* was based upon the facts of ownership and operational control.[182]

Since the *Catholic Bishop* test likely is satisfied on the facts of *Notre Dame* and *Barber-Scotia,* the assertion of juris-

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[176] Diocese of Brooklyn, 243 N.L.R.B. No. 24 (1979). Conversely, the Board has declined jurisdiction in subsequent cases, specifically relying on *Catholic Bishop* in such orders. *See, e.g.,* Archdiocese of Philadelphia, 244 N.L.R.B. No. 79 (1979); Gordon Technical High School, 243 N.L.R.B. No. 124 (1979); Bishop of Gary, 243 N.L.R.B. No. 2 (1979).

[177] 243 N.L.R.B. No. 24 (1979).

[178] *Id.*

[179] *Id.*

[180] 245 N.L.R.B. No. 44 (1979).

[181] 245 N.L.R.B. No. 48 (1979).

[182] The Board itself had used the facts of ownership and operational control as grounds for excluding faculty from bargaining units in *Seton Hall* and *Niagara,* and the Supreme Court, in effect, merely elevated the Board's exclusionary standard to a jurisdictional test.

diction in those cases is a proper result. The emphasis that the Board placed on the differences between secondary and higher education, however, is not only unnecessary as a decisional ground but is an improper consideration under the *Catholic Bishop* criteria.

CONCLUSION

At this writing, the institution of collective bargaining among university faculty is being challenged on many fronts.[183] The conclusions of the Board in areas such as the part-time faculty and support staff issues have been endorsed solidly. On fundamental issues, however, the rulings of the Board have failed in direct challenges before the United States Supreme Court. The *Catholic Bishop* decision held that the Board may not assert jurisdiction over a religiously sponsored and controlled ("church-operated") educational institution. Additionally, the *Yeshiva* court found, contrary to the arguments of the Board, that the collegial or committee exercise of what typically is considered to be managerial authority will cause employees on such committees to be classified as managerial employees. The Supreme Court's remand of *Boston University* for reconsideration in light of *Yeshiva* must be taken to mean that the collegial principle, as applied to department chairmen, no longer can serve as a ground for permitting the inclusion in a faculty bargaining unit of a chairman who exercises supervisory or managerial authority, even if he does so with faculty consultation.

The Supreme Court's *Yeshiva* decision is clearly correct. The analysis of Justice Powell in the *Yeshiva* opinion yields an equally sound position whether focusing on the managerial employee, as in *Yeshiva,* or the supervisor. The Act, in defining the term "supervisor," uses the phrase "any individual having authority, in the interest of the employer . . . [to make or] effectively to recommend" supervisory decisions or ac-

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[183] The Wall Street Journal reports that a dozen private colleges have refused to bargain with faculty unions since *Yeshiva* and that more are expected to refuse to negotiate following the expiration of current contracts. Wall St. J., May 20, 1980, at 1, col. 5.

tions.[184] But the statutory definition includes no requirement that the particular individual act wholly individually nor does it preclude him from acting with another in a supervisory capacity. Moreover, as noted before, the managerial employee definition has never been encumbered by the problem of the individual versus the group exercise of authority. *Catholic Bishop* is a less satisfactory opinion, for it fails to set forth any clear guidelines concerning the meaning of "church-operated." But the decision is important for it perhaps shows the Court's willingness to restrict the Board in its assertion of jurisdiction over religious, albeit educational, institutions.

The Board has thus been rebuffed on two fronts. The impact of *Yeshiva* will be to preclude the institution of collective bargaining among faculty at smaller colleges and universities, because practically all faculty members at a collegially-governed college sit on at least one supervisory or managerial committee. And the impact of *Catholic Bishop,* already noticeable in subsequent cases before the Board, has been to restrict the Board's view of its jurisdiction over a class of private employers.[185] These Supreme Court decisions have dealt organizing efforts among private university faculties a severe, although not necessarily fatal, blow. After a ten-year span of intense organization and litigation spawned by the Board's expressed willingness to assert its jurisdiction, to plunge into the determination of appropriate bargaining units, and to direct the elections therein, such organizational efforts undoubtedly will decline. The Board's apparent inability to assert effectively its jurisdiction in many, if not most, faculty collective bargaining and representation cases can have no other result.

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[184] 29 U.S.C. § 152(11) (1976).

[185] See note 176 *supra* for a list of cases which reflect the impact of *Catholic Bishop.*